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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 955

JOHN J. FELICE, *Petitioner*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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It is with great respect and humility that the petitioner is constrained to reply to the Brief in order to serve justice as contemplated by the Constitution. The arduous task of framing language when taking issue with a branch of our Government is harrowing but cannot be eliminated since, in the petitioner's opinion, irreparable harm may be sustained not only by him but by law as a result of the misleading avoidance of the issues in this case to

which the Government has resorted in its Brief. Mindful of the responsibility that the Solicitor General's Office has to other Government agencies, we do not take specific issue with it as to its motives in this case, but must nevertheless not compromise our endeavor to meet the requirements of law and justice in order to avoid regretful but unavoidable expressions and conclusions.

I. THE BRIEF IN GENERAL

Because of the following factors, the Brief for the United States in Opposition, hereinafter mentioned as the Brief[1] offends the requirements of justice and fairness:

1. It misstates facts to the extent that it gives half-truths in the "Statement" (B. 3-5).

2. Although there is nothing of extortion, demand, pressure or intimidation in the record, the Brief presents (B. 4, 5) inadmissible, incompetent and hearsay evidence in such a manner as unfairly to indicate that the loan from Carter to petitioner was not a loan.

3. It avoids mentioning pertinent facts necessary for a clear understanding of the case with regard to the evidence.

4. It takes out of context statements in the Petition for Certiorari.

5. It is not responsive to the important questions of law raised in the Petition.

Other serious defects in the Brief will be pointed out below. Under the circumstances, the petitioner above regrets that he feels constrained to file this Reply Brief and thereby increase the many time-consuming responsibilities of the Court.

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[1] The Brief is also designated "B"

II. GOVERNMENT'S COUNTERSTATEMENT OF FACTS

1. On page 4 of the Brief, the reversal by the Court of Appeals of the City Products Corporation's conviction is attributed to a single fact, i.e., that "City Products had no employees." This is a misleading and inaccurate half-truth. The Appellate Court considered and discussed additional evidence as a basis for the reversal. In the Brief's "Argument," it is true, part of this evidence is discussed (B. 6) but in the "Statement" of facts (B. 3-5) that precedes the "Argument" only the above-mentioned single fact is referred to in the obvious hope that the cumulative effect of this half-truth and certain other incompetent evidence discussed in the "Statement" would create a picture of culpability before the "Argument" is reached by the reader. As a matter of fact, the entire "Statement" is predicated on this misleading pattern of creating a nebulous and insidious sense of guilty conduct on the part of the petitioner.

To further this purpose, the "Statement" also presents (B. 4, 5) incompetent and hearsay evidence. But worse than that it presents certain half-truths in such a manner as to raise serious question whether such advocacy is worthy of a branch of our judicial system even to exculpate judicial decision. Thus, the Brief states (B. 5) that "Carter told Nero to keep the transaction confidential." But it does not state that Nero, in referring to this "transaction," said that Carter had told him that he was going to "loan" money to the petitioner (Appendix, page 25a). Nor that Nero testified that Felice "secured a personal loan from Mr. Carter." (Ibid., p. 80a). Nor did the Brief state the most important fact that the cause for the instruction to keep the loan "confidential" was that Carter "didn't want a lot of people to make loans if information like this got out." (Ibid., p. 83a). The misleading unfair and insidious implication that the instruction was made because the transaction was a gift and not

a "loan" is obviously intended to be veiled in this half-truth of the Brief. This method that pervades the Brief makes it imperative to read the petition with the great care that the Court gives to important deviations from due process of law and which it is submitted are shown by the petition. Nor does the Brief mention that loans by City Products to employees were likewise treated as confidential. (Ibid., p. 85a).

The Brief is also unfair and misleading in stating that "Carter had negotiated a number of labor contracts with petitioner." (B. 4). It tortuously avails itself of the record, which is misstated, and does not reflect the Government's testimony regarding "negotiation." On page 178a of the Appendix, which is referred to in the Brief (B. 4), it is specifically stated that contracts were *negotiated by John D. Marshall*, Executive Secretary of the Brewers Association of Cleveland and *unions* for the *breweries* in Cleveland, which negotiated area contracts. It is not stated in the record there that those contracts were negotiated by Felice and Carter *per se* as the Government contends, although Felice and Carter were signatories to them.

The reference in the "Statement" (B. 5) concerning the improper and incompetent evidence on the income tax will be discussed below.

III. QUESTIONS PRESENTED

The Petition raises seven important questions. An examination of the "Argument" (B. 5-9) shows that the Brief again misleads and misstates. It is argued (B. 5) that there is no merit in the "Petitioner's claim that the reversal of the conviction as to City Products requires a reversal as to him". This is a reference to the First Question in the petition. This, however, is a misleading misstatement of that question. A reading thereof on page 2 of the Petition will show that the question does not refer to the mere fact of the reversal but to a great deal of

evidence *that was taken into account by the district court in convicting the petitioner as well as City Products* and the other two defendants in the case and which evidence was completely discarded and discredited by the Court of Appeals. As pointed out in the petition (page 14), the fact that the discarded evidence was considered erroneously by the trial court raises serious doubts before this Court whether the petitioner would have been convicted in the absence of the evidence discarded by the Court of Appeals.

A reading of the Argument will also show that other questions are glossed over, adroitly veiled, unanswered and even distorted.

IV. ARGUMENT

1. Acquittal of City Products

The first contention in the Argument (B. 5), which deals with the acquittal of City Products, has been answered above.

2. Insufficiency of the Evidence

The second contention states (B. 6) that "as the court of appeals held, the evidence amply supports the conviction". This is the only reference to the Court of Appeals in connection with this issue. On page 6 of the Brief it is stated: "Accordingly, there was sufficient evidence to support the conviction" of the petitioner. The only discussion of evidence in support of this erroneous conclusion which precedes the word "Accordingly" is (1) another improper conclusion from the payment of income tax which will be discussed below and (2) the fact that the loan had not been repaid. No mention is made of Felice's inquiry of Carter with respect to repayment or of the overwhelming direct evidence and other evidence discussed in the petition (pp. 42-52) which shows the transaction to be a loan. The Brief refers (B. 6) in this connection to pages

42-52 of the petition but a reading of these ten pages will convince this Court not only that the evidence fails to support the petitioner's conviction but will lead to the inescapable conclusion that the Brief has made no serious attempt to disprove the petitioner's contentions in these ten pages that there is not sufficient evidence to support the trial court's finding, unrectified by the Court of Appeals, that the petitioner received a gift and not a loan. And the Court of Appeals held that, unless the trial court "could find, beyond a reasonable doubt", that the transaction was not a loan but an "outright payment", the petitioner must be acquitted (Pet., p. 61).

3. Wilfulness and Knowledge

As to the alleged wilfulness and knowledge by the petitioner that the loan was made by Pilsener Brewing Company, the Brief refers (B. 7) to three things which totally fail to support the said contention. They are:

(a) "The money was paid at the Pilsener office." The Brief states this but fails to add that it was Carter who asked the petitioner to come to his office to receive the money and give the note. The petitioner had nothing to do with the choice of the place. A borrower may go to his friend's office, without arriving at the conclusion that the loan is made not by his friend but by his friend's employer. Would the employer be legally responsible for loans made to employees at the latter's office if Carter had borrowed money personally.

(b) According to the Brief (B. 7), Carter was the "boss of the Pilsener Brewing Company". We find, however, that Carter was not the boss in regard to this transaction. He had to obtain the approval of Zeidler who was a responsible officer of City Products, the parent company of Pilsener (App., p. 448a). And yet the City Products' acquittal by the Court of Appeals was in spite of the trial court's finding that Zeidler had approved a gift and not a loan.

(c) "Negotiation" of contracts between Carter and petitioner is also mentioned in the Brief (B. 7). This point has been answered above.

4. Retroactive Amendment of Statute

The petition's serious constitutional issues as to retroactivity raised by the sixth question (Pet., pp. 25-29) are unfairly reduced to the question whether "Carter must be distinguished from Pilsener". The only discussion of the evidence in support of this unwarranted conclusion is a dogmatic statement that the evidence supports the finding that Carter in making the loan was "acting as an agent of an employer". There is no discussion of the overwhelming evidence against any assumption that this was not a loan from Carter as a friend. There is not even an attempt to discuss the important legal points raised in five pages of the petition (pp. 25-29). All these points are disposed of by again dogmatically asserting a conclusion, without any reasoning at least to attempt to support it, to the effect that "The legislative history of the 1959 amendment cited by petitioner (Pet., pp. 25-26) seems to indicate primarily an intent to facilitate proof." It is submitted that a mere reading of the 1959 amendment would suffice to show that it went beyond a procedural question of evidence and proof. In the language of the Court of Appeals, the 1959 amendment was intended to cover "loans and lending", transactions not proscribed by the unamended statute (Pet., p. 59).

5. Violation of Due Process of Law

Leaving the last paragraph of the Brief for later discussion, the rest of the Brief is an unfair distortion of another serious constitutional question raised by the petitioner as well as a plethora of artful half-truths that do not do justice to the petitioner.

The first two sentences of this part of the argument (B. 7) would give the improper impression that the objected

evidence as to the write-off by City Products of petitioner's note was the only one in which the trial court reserved ruling as to admissibility of objected evidence subject to subsequent connection. This is not a fact. An examination of the record will show several such instances and even the Court of Appeals used the plural number in referring to instances where the "District Judge reserved his rulings" (Pet., p. 70). Furthermore, the Brief states (B. 8) that "there is still no indication that incompetent evidence was admitted against him [the petitioner]". What a remarkable statement! The reception into evidence as against the petitioner of the charge-off was not only *incompetent* evidence but prejudicial error. It was not only a unilateral action by City Products but *remote in time, 1960*, from the loan in 1956, as well as hearsay. Instances of the admission of numerous improperly admitted facts and evidence are given on page 51 of the petition.

The Brief also states (B. 8) that "it was proper to defer ruling". This is not what the petitioner claims to be improper. Of course, a court has the right to defer a ruling subject to subsequent connection of the evidence. What is complained of is that the court failed to rule whether the line of objected testimony had been connected and *never* ruled on any ground so far as the objected evidence was concerned.

The Brief endeavors to taint (Ibid.) the record with respect to this problem by saying that it was abandoned by petitioner. It is hard indeed to see how abandonment could reasonably be contended when, as already stated, the record is replete with repeated objections and when this problem was treated by the Court of Appeals (B. 70).

The Brief's statement (B. 8) that "the government must start somewhere in its proof" is distorted when it is offered as a justification of the judge's failure ultimately to rule on whether the objected evidence had been connected or was properly objected to by petitioner.

The above discussion under number 5 relates to the point made by petitioner that the Court of Appeals has so far sanctioned such conduct by the trial court "as to call for the exercise of this court's power of supervision" in order to remedy a violation of the due process of law resulting from the trial court's conduct of the trial. This point is discussed and fully documented and paginated on pages 17 to 24 of the petition. It is quite significant that, in the Argument, the Brief cites in parentheses *the total number of pages in the petition* in which there is discussion of Point I (Pet., pp. 12-16, cited on B. 5), Point III (Pet., pp. 25-29, cited on B. 7), Point IV (Pet., pp. 30-35, cited on B. 9), Point V (Pet., pp. 35-41, cited on B. 7) and Point VI (Pet., pp. 42-52, cited on B. 6). No such citation of the pages in the petition devoted to Point II (Pet., pp. 17-24) is made in the Brief? And one is of course struck by this omission and is led to seek the reason therefor. Was it an adroit way of avoiding calling attention to the petition's cohesive and reasonable attack against a serious violation of due process of law? Was it hoped that, by calling attention in the Brief to fragments of Point II and not to the fundamental constitutional issue raised by the petitioner, the chance of successfully avoiding the combined weight of the totality of the issue would be enhanced? Be that as it may, by the fragmentary treatment of this very important Point II, the Brief has again artfully avoided a serious discussion, for the benefit of the Court, of many points, including the question of how is counsel properly to defend his client when the trial court admits evidence "either as being relevant or *as tending* to either make something else relevant *if and when it does*, or become relevant by supplementary evidence . . ." (Pet., p. 19). How is counsel to disentangle such labyrinthian ruling? Or to know which one of these three different criteria the court relied upon in admitting objected evidence when the court would rule that such evidence was admissible? Or to know whether the evidence applied to the one of the four defendants with whose de-

fense he was entrusted? Such criteria afforded the judge an *easy* method of avoiding rulings; but it deprived defense counsel of an opportunity to (1) exclude prejudicial and improper evidence, (2) prepare and present a proper defense and (3) lay a foundation for appeal, in view of the ingeniously generic and sweeping language of the court.

For the other important issues involved in this Point II, the Court's attention is invited to pages 17-24 of the petition.

Significantly it may be pointed out that the District Court and the Brief attempted to justify the fact that rulings had not been made by the District Court because that Court was not required to catalog the evidence. The Brief, in an endeavor to support this fact, poignantly focused to this Court *abandonment* by the petitioner with respect to this point. Regardless of the exculpatory endeavors, counsel for petitioner, in compliance with the prejudicial rulings by the District Court, did catalog, all of the evidence, irrelevant, hearsay and that envisaged by other objections. The motion for judgment of acquittal served all of the requirements posed by the District Court and the court summarily denied the said motion. The Court of Appeals recognized the impropriety of the District Court's failure to rule on questions of evidence and indicated that it posed a tremendous hardship upon counsel in preparing defense of his client, but the Appeals Court also failed to recognize that the petitioner had preserved the objections on evidence by the motion for the judgment of acquittal. The petitioner does not mean to imply that the Solicitor General's Office in its Brief or in its attempt to exculpate what was done in the motion for judgment of acquittal sanctioned or knowingly avoided the recognition that the petitioner never abandoned the objections made in the District Court for failure to rule.

6. Form 870

The last paragraph of the Argument (B. 9) refers to Form 870 and the payment of income tax on the $4,500.00. This paragraph is without merit. It is (1) self-contradictory, (2) contradictory of prior governmental assertions and court findings, (3) misleading, (4) evasive, (5) remote in time, and (6) should not have been admitted in a criminal case because of its highly prejudicial character.

(a) The paragraph states Form 870 "was of *no importance.*" (Emphasis supplied. B. 9). Yet, in the very next sentence, it is stated that the issue whether the petitioner treated the $4,500 as "money received and not as a loan" is "*an important issue* if loans were not covered by the statute under which he was charged." (Emphasis supplied, B. 9). The Court of Appeals found that it was important to determine whether the transaction was a bona fide loan, since a loan would not violate the statute. In Form 870, the $4,500 is treated not as a loan but as income, as money received. How could it therefore reasonably be contended that Form 870 was not important?

In connection with this point, the evidence in the record is plain that the transaction was a loan (Appendix, p. 134a). Nonetheless, the Government urged the $4,500 was taxable income to the petitioner. (Ibid., p. 126a). Finally, on advice of his tax attorney, one Cozza, petitioner agreed to execute Form 870 and paid the tax (Ibid., pp. 296a, 297a, 302a). Petitioner did not easily accede but ultimately conceded to his attorney's recommendations (Ibid., p. 305a). This event occurred in 1960, almost four years after the original transaction in 1956 (but prior to the institution of this proceeding). In relation to the intent of the petitioner to make a loan in 1956, the remoteness in time of the 1960 event as a basis for an inference contradictory of such intent, especially in the face of all the overwhelming evidence to the contrary discussed in the petition, and par-

ticularly on pages 42 to 52 thereof, is too apparent to need further comment.

(b) The paragraph also contradicts statements by both the District Court and the Court of Appeals. The former regarded such evidence as "significant". (App., p. 446a). As stated on pages 30 and 31 of the petition, if the Court of Appeals meant that the admission of the evidence in question was non-prejudicial but cumulative, such finding would be inconsistent with the above statement of the trial court and, in fact, with the heavy weight given by the Court of Appeals itself to such evidence (B. 31).

The importance of this evidence thus cannot be gainsaid. And if Form 870 was inadmissible, a prejudicial error, unrectified by the Court of Appeals, was committed. Was it admissible? The Government conceded that, if Form 870 were a "compromise", it would have been "incompetent evidence" (App., p. 434a), because "public policy states that the courts follow the rule that the courts encourage compromise". (*Ibid.*) Then, Government counsel argued that, because petitioner had paid what the Government had asked, it was not a compromise (*Ibid.*, pp. 247a, 248a). This argument is unsound. The closing out of the years involved, 1954, 1955 and 1956, and the dropping of other questions raised are sufficient to present a clear picture of compromise. There was mutuality of accommodation, there was give and take, which are the very essence of compromise. To avoid the uncertainties of litigation should he refuse to pay tax on the basis of the Government's insistence, the petitioner accommodated the Government's adamant position. On the other hand, to avoid the uncertainties of litigation and get the certainty of payment, the Government gave up the possibility of additional payments by way of penalties. Furthermore, the same Government counsel, who denied that there was compromise between petitioner and the Government, in his examination of one of his own witnesses, Meister, an Internal Revenue agent,

used the words "proposed adjustments" (Ibid., pp. 130a, 131a, 132a); "settlement" (Ibid., p. 132a); "adjustment" (Ibid., p. 135a); the result of which is Form 870, which the same witness said "is the agreement we request the taxpayer to sign for any additional tax assessment". (Ibid., p. 141a).

The chameleonic characterisations by the Government of this evidence is remarkable. In the Brief, Form 870 is stated to be "of no importance" (B. 9). In another Government brief (Pet., p. 34) it is alleged that Form 870 was not offered as establishing tax liability of petitioner but to show how the controversy was terminated (Pet., p. 34). While the latter contention is erroneous (Ibid.), it shows that the Government considered Form 870 important as evidence, at least for the alleged purpose. What is the reason for this shifting and ever-changing position with respect to Form 870 and does such change suggest responsible presentation of evidence in the interest of justice? Other important issues concerning this evidence, issues which have not been met in the Brief, may be found on pages 31 to 35 of the petition. Also, *arguendo*, if there were no Form 870 and all of the evidence complained of was allowed as proper, could there have been a conviction?

CONCLUSION

For the foregoing reasons, it is respectfully reiterated that the petition for a writ of certiorari should be granted.

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